United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

8-12-77

76-7426
77-7032

To be argued by: Jack P. Levin

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P/S

UNITED STATES COURT OF APPEALS

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Nos. 76-7426
77-7032

RAYMOND G. LASKY, et al.,

Plaintiffs-Appellees,

-against-

SHERIFF LAWRENCE QUINLAN, et al.,

Defendant-Appellant.

On Appeal from Orders of the
United States District Court
for the Southern District of New York

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PRELIMINARY STATEMENT

These are appeals from a judgment of the District Court finding the Sheriff of Dutchess County to be in wilful contempt of a 1973 consent order under which he agreed to make administrative and physical reforms at the Dutchess County Jail in Poughkeepsie, New York. 419 F. Supp. 799. This Court, in its July 29, 1977 Judgment vacating the contempt judgment as moot and remanding for

dismissal,* has made a mistake of fact in assuming that the contempt proceeding was brought on behalf of the original named plaintiffs who were no longer at the Jail when the proceeding was brought. In fact, the contempt proceeding was brought on behalf of inmates then at the Jail. The Court's opinion does not deal with this fact, which is fully supported by the record below.

To allow this Court's order of dismissal to stand would work a substantial injustice and would burden the courts with extensive, repetitive litigation. The relief the inmates have won by the contempt order and by subsequent court orders after a four-year struggle -- including the appointment of a highly professional warden -- will be lost, and inmates will be forced to relitigate the identical issues already determined by the District Court.

At no time in the four years that this action has been pending has anyone questioned the fact that there have been inmates at the Jail who were suffering the effects of the Sheriff's noncompliance with the 1973 consent order. As the record shows, an inmate's letter to the District Court led to the contempt proceeding. This has been a live controversy in every sense, as evidenced by the letters and telephone calls of complaint to counsel and to the District Court.

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* Slip Opinion 5085-5091 (Timbers and Meskill, Circuit Judges, and Palmieri, District Judge).

The issues of mootness and standing were never raised until the Court did so at oral argument. The Court's opinion applies jurisdictional principles to a factual assumption -- that the contempt proceeding was brought on behalf of the persons listed as named plaintiffs in the caption of this action -- an assumption that is demonstrably incorrect.

The Court is therefore respectfully urged to vacate its judgment and, based upon facts in the record below to find:

- that the contempt motion, at the time it was filed, was brought by counsel on behalf of his clients, who were aggrieved inmates then at the Jail;

- that those inmates had standing to bring the contempt proceeding as persons in whose favor the 1973 consent order was intended to operate;

- that the action was not moot as to them; and

- that the District Court therefore had subject matter jurisdiction to entertain the contempt motion.

Counsel concedes that the contempt motion papers may not have included specific allegations of subject matter jurisdiction and that they were drafted to refer collectively to "plaintiffs" and "inmates" as opposed to specific inmates. But facts sufficient to invoke subject matter jurisdiction are

in the record. Accordingly, the inmates should be permitted to amend those papers to make the requisite jurisdictional allegations, as permitted by 28 U.S.C. § 1653 (1970). Such an amendment, which would conform the papers to facts which were well known to the Sheriff, cannot prejudice him. If the Court has doubts as to the completeness of the record on this issue, this case should be remanded to the District Court for specific findings as to these jurisdictional facts.

Already, the Sheriff's contempt has consumed far more judicial time than was anticipated in 1973. On October 1, 1973, in a statement before the Commission on Revision of the Federal Court Appellate System of the United States, Chief Judge Kaufman cited this consent order as a model for the resolution of inmate grievances.

> "The potential for meaningful change here was exemplified, only a few weeks ago, by the successful efforts of Judge Gurfein of the Southern District of New York in a suit challenging the conditions at the Dutchess County Jail. Rather than permitting the case to take its normal course, consuming precious judicial resources at the trial and, eventually, appellate levels, Judge Gurfein actively sought and achieved a settlement of the complaint which was formalized in a detailed stipulation between the prisoners and the prison authorities, reciting seriatim the changes to be effected." (p. 6b).

BACKGROUND

This action was commenced on April 16, 1973 by the filing of a pro se class action complaint by five in-

mates at the Jail (6a). Judge Gurfein appointed Jack P. Levin as counsel for the plaintiffs, and following investigation by counsel of the allegations of the complaint, a hearing on a motion for a preliminary injunction was held. At the conclusion of that evidentiary hearing plaintiff's counsel moved orally for the certification of a class. Judge Gurfein granted the motion. The Sheriff's counsel stipulated to the certification of a class. (Transcript of Hearing, July 6, 1973 at 3-6).*

On July 30, 1973 the District Court issued an order approving a stipulation drawn by the inmates' counsel requiring the Sheriff to make specific administrative and some physical changes at the Jail (27a; 80a). The action was dismissed upon the filing of the stipulation, "subject to re-opening or the institution of contempt proceedings in the event of a wilful failure to comply with the aforementioned order of the Court." (82a). The District Court recognized the continuing obligation of the inmates' counsel to monitor compliance with the 1973 Stipulation and Order to ensure that the rights of all his clients, the inmates at the Jail, were not violated:

> "No other order is required at this time, but assigned counsel may request a right of

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* Because the action was settled on a stipulation soon after the July 1973 hearing, only a small portion of the minutes of that four-day proceeding was transcribed. The colloquy at the end of the hearing has been transcribed since this Court's Judgment entered July 29, 1977. (Record Item 92).

visitation at some time in the future. They may, in the meantime, communicate by mail with inmates as 'special correspondence' under the conditions provided in the order." (82a; 30a).

Judge Gurfein stated that he saw "no need to declare this a class action, since I can find nothing substantial in a constitutional sense that is likely to be added because of a class determination." (82a). No mention was made of the prior class determination. Apparently, in view of the fact that the case was being settled by Stipulation, Judge Gurfein wished to do no more than appeared necessary. Unfortunately, neither Judge Gurfein nor the inmates' counsel contemplated the flagrant violations which followed the filing of the Stipulation and Order.

POINT I

THE RECORD BELOW SHOWS THAT THE CONTEMPT MOTION WAS BROUGHT ON BEHALF OF INMATES AT THE JAIL WHO WERE SUFFERING THE EFFECTS OF THE SHERIFF'S NON-COMPLIANCE

The contempt motion was brought in response to an inmate's letter of complaint to the District Court. On September 4, 1975, three months prior to the filing of the contempt motion, John T. Dvorocsik, then an inmate at the Jail, wrote to Judge Lasker of the

District Court*:

> "I was made aware of an inmate class action suit entitled Lasky v. Quinlan, 73 Civ. 1666, and after reading carefully the stipulations, I believe that for the following reasons this class action should be reopened to consider holding the Sheriff in contempt because he has wilfully failed to comply with the above-mentioned court order."

Mr. Dvorocsik's letter reviewed the 1973 Stipulation, paragraph by paragraph, describing the Sheriff's non-compliance. The letter was in substance what, after consultation with other inmates, became counsel's affidavit in support of the contempt motion. The letter ends as follows:

> "Honorable Justice Lasker, I don't know proper legal process but I request you consider this to be a petition or writ or whatever is needed to reopen the above case. I can supply evidence to verify everything in this petition if giving [sic] a chance. As the New York State Commission of Correction has issued many directives and orders which have been ignored. I believe as I am a poor person and if you would appoint counsel to represent me, I can convince your honorable Court of the above." (Emphasis added.)

After careful investigation of Mr. Dvorocsik's charges and after interviews with many inmates and guards, counsel brought the contempt motion on behalf of Mr. Dvorocsik and other inmate clients on December 8, 1975. Mr. Dvorocsik was released from the Jail on November 25,

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* Mr. Dvorocsik addressed his letter to Judge Lasker, who forwarded it to Judge Werker, to whom the case was assigned after Judge Gurfein's appointment as a Judge of this Court. Judge Werker sent a copy of the letter to Jack P. Levin, the inmates' counsel. (Record Items 89-91).

1975 and gave lengthy and articulate testimony at the contempt hearing. Other inmates were brought from the Jail to testify.*

Andrew Walker had been at the Jail since July 5, 1975 (Tr. 280). He testified on matters relating to classification, hygiene, linens, rules and regulations, plumbing, work assignments, recreation, food, access to law books, cell lighting, medical care, dental care, inmate mail, access to a telephone and punitive segregation (Tr. 280-305).

James Rose was admitted to the Jail on September 7, 1975. He testified as to most of the matters testified to by Mr. Walker (Tr. 268-279).

Lovlie Smith had been at the Jail since October 26, 1975 (Tr. 359). She testified as to the lack of medical services for women (Tr. 359-361).

Therefore, it is clear from the record that the contempt motion was brought on behalf of specific inmate clients who voluntarily and vigorously supported the prosecution of that motion.

Subsequent to the judgment of contempt below, a further motion was made on October 16, 1976. After a hearing

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* Inmates testified voluntarily and not pursuant to subpoena. Other inmates who were prepared to testify but were not called were Frederick Cunningham, J. Crowe, W. Lane, E. La Marche, C. Mann, Maurice Samuels, Bruce Velie, P. Wilcox, Robert Braman and Charlene AuClair (Record Items 46-58).

on that motion (200a), a chambers conference was held at which the Sheriff consented to yield control over the Jail to a warden-administrator to be appointed by the District Court. Judge Werker asked Dutchess County officials to search for a candidate. The County proposed John L. Lissner, who was appointed to the post, on consent, by an order of the District Court on December 26, 1976. (290a).

The most serious and tragic consequence of this Court's July 29, 1977 Judgment would be the removal of Warden Lissner. If control of the Jail is returned to the Sheriff, a resumption of serious physical and administrative neglect is a near certainty.

POINT II

THE CONTEMPT MOTION WAS PROPERLY BROUGHT PURSUANT TO RULE 71 ON BEHALF OF INMATES AT THE JAIL

As set forth above, the jurisdictional facts in the record below negate a finding of mootness and support the standing of inmates who were at the Jail when the contempt motion was brought on their behalf. Rule 71 of the Federal Rules of Civil Procedure states, in pertinent part:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; . . ." (Emphasis added).

This Court's opinion states:

> "It seems clear that Rule 71 was intended to assure that process be made available to enforce court orders in favor of and against persons who are properly affected by them, even if they are not parties to the action. 7 J. Moore, Federal Practice, ¶ 71.02 (1975). . . ." (Slip Opinion at 5091).

However, without giving reasons or authority the Court restricts the way in which such an aggrieved non-party may enforce the court order made in his favor:

> " . . . Rule 71 may support a separate action by a present inmate to enforce the order obtained by the plaintiffs . . . ." (Slip Opinion at 5091) (Emphasis added).

It is respectfully submitted that the restriction to enforcement by a "separate action" is wrong. If Rule 71 literally means that a non-party "may enforce obedience to the order by the same process as if he were a party", then the inmates here properly sought to enforce the 1973 Stipulation and Order by bringing a contempt motion instead of a separate action. There is no authority for the proposition that persons in the position of the inmates have to bring a separate action.* Professor Moore suggests that it is proper to proceed by motion under Rule 71.

> "The type of process that may be utilized be it a writ of execution, assistance, attachment, sequestration, contempt, or other court process, will depend, naturally, upon the circumstances in each case." (Emphasis added). 7 J. Moore, Federal Practice, ¶ 71.02 (1975).

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* Even if Rule 71 were interpreted to require a separate action, Mr. Dvorocsik's letter certainly qualifies as a pro se complaint.

See also United States v. ASCAP, 341 F.2d 1003 (2d Cir.), cert. denied, 382 U.S. 877 (1965); Spangler v. Pasadena City Bd. of Educ., 537 F.2d 1031 (9th Cir. 1976); United States v. Paramount Pictures, Inc., 75 F. Supp. 1002 (S.D.N.Y. 1948).

Even assuming that a separate action might have been brought, "any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment." Schlesinger v. Councilman, 420 U.S. 738, 742 n.5 (1975). The contempt motion was properly brought on behalf of inmates who were then aggrieved and who were seeking through the courts the relief falsely promised them two years earlier.

POINT III

THE COURT SHOULD PERMIT THE AMENDMENT OF THE CONTEMPT MOTION PAPERS TO ASSERT SUBJECT MATTER JURISDICTION

The contempt motion papers omitted to state explicitly the District Court's subject matter jurisdiction based upon the presence of inmates at the Jail seeking to enforce the 1973 Stipulation and Order. However, this technical omission to name the specific inmates on whose behalf the motion was brought can be corrected on appeal

by use of the power conferred by 28 U.S.C. § 1653 (1970), which provides:

> "Amendment of pleadings to show jurisdiction
>
> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."*

As this Court stated in John Birch Soc. v. Nat'l. Broadcasting Co., 377 F.2d 194, 198-199 (2d Cir. 1967):

> "An application under § 1653 is, of course, addressed to the discretion of the court, and usually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist. . ."

See Mathews v. Diaz, 426 U.S. 67, 75 n. 9 (1976); Schlesinger v. Councilman, 420 U.S. 738, 746 n.5 (1974); Willingham v. Morgan, 395 U.S. 402, 407-408 (1969). This section is intended to permit pleadings to conform to jurisdictional reality and thus to prevent waste of judicial time in a sacrifice of substance to form. McGovern v. American Airlines, 511 F.2d 653 (5th Cir. 1975). The section is consistent with the practical policies found in Rules 1 and 8(f) of the

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* As the moving papers in a Rule 71 proceeding are the papers which should set forth the jurisdiction of the court (as these are the papers which commence the proceeding) 28 U.S.C. § 1653 is the source of the power of the district or appellate court to permit amendment. Thus, in NLRB v. Rozelle Shoe Corp., 205 F.2d 447, 448 (1st Cir. 1953), an appeal from an order to the NLRB, § 1653 was cited for the authority of the appellate court to permit amendment of papers to set forth the jurisdiction of the NLRB.

Federal Rules of Civil Procedure. There is no reason to deny its application to Rule 71 process.

In this case it is certainly "possible to determine from the record that jurisdiction does in fact exist." John Birch Soc. v. Nat'l Broadcasting Co., 377 F.2d at 199.* As the record here shows, there are only facts which support subject matter jurisdiction. There are no facts to the contrary.**

The defects in the allegations of jurisdiction were never raised below. If they had been raised, they could have been cured by an appropriate amendment to counsel's moving affidavit or by the filing of affidavits by inmates on whose behalf the contempt motion was brought. Those inmates were at the Jail when the contempt motion was brought, they were active in prosecuting the motion and they had a real stake in the outcome. As set forth at page 7, supra, a letter of complaint to the District Court commenced this entire proceeding. In light of these factors and the

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* If the Court were to decide this petition on these papers rather than requesting further papers or argument, plaintiffs respectfully request that this petition be treated as a motion to amend pursuant to 28 U.S.C. § 1653.

** This case is therefore different from the cases relied upon by the Court, where there were facts before the courts militating against subject matter jurisdiction. Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975) (no student in school at the time of the hearing);

complete absence of prejudice to the Sheriff, it would be a manifest injustice and an enormous waste of judicial time not to permit such amendments as may be necessary. The Court can then reach the merits of these appeals.*

CONCLUSION

These appeals affect the physical well-being and the legal rights of the men and women incarcerated at the Dutchess County Jail. The controversy before the Court is not academic. The inmates and their counsel have worked for four years to end the suicides, assaults and general neglect which plagued the Dutchess County Jail prior to the District Court's appointment, on consent, of Warden John L. Lissner. Those years of effort are now threatened by a highly technical, factually unsupported view of this case.

The record below fully supports the District Court's jurisdiction. Accordingly, in order to avoid the lengthy

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North Carolina v. Rice, 404 U.S. 244 (1971) (prisoner released from prison); Ringgold v. United States, 553 F.2d 309 (2d Cir. 1977) (cadet challenging West Point honor code had resigned).

* If it were to be concluded that the record in this action were in any way unclear on the issue of jurisdiction, remand for further proceedings would be appropriate. Eisler v. Stritzler, 535 F.2d 148, 151 (1st Cir. 1976); Tatum v. Laird, 444 F.2d 947, 951 , n.8 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972); Fifth Assoc. v. Prudential Insur. Co. of America, 446 F.2d 1187, 1192 (9th Cir. 1970); Cf. United States v. Southern Pacific Transp. Co., 543 F.2d 676, 684 (9th Cir. 1976).

relitigation of this case it is respectfully urged that the Court vacate its July 29, 1977 Judgment, deem the moving papers in this proceeding to be amended pursuant to 28 U.S.C. § 1653 and affirm the contempt judgment below in all respects.

Dated: New York, New York
August 12, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

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Plaintiffs-Appellees, :

-against- :

SHERIFF LAWRENCE QUINLAN, et al., :

Defendant-Appellant. :

- x

Nos. 76-7426
77-7032

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DENISE BRADLEY, being duly sworn, deposes and says that she is over the age of 18 years; that on the 12th day of August, 1977 she served the annexed Plaintiffs-Appellees' Petition For Rehearing And Suggestion For Rehearing In Banc on

Peter R. Kehoe, Esq.
37 First Street
Troy, New York 12180

by depositing two true copies of the same securely enclosed in a postpaid wrapper in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza in the City and County of New York, directed to said attorney at the address set out under his name; this being the address designated by him for this purpose

upon the preceding papers on these appeals.

Denise Bradley

Sworn to before me this

12th day of August, 1977.

Jack P. Levin

JACK P. LEVIN
Notary Public, State of New York
No. 24-4512773
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1979